(2)

No. 90-602

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PAUL YOASH AND MARK CASSON,

Petitioners,

v.

McLEAN CONTRACTING COMPANY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH DISTRICT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas G. Young, III
(Andrew M. Battista, on Brief)
Suite 707 Susquehanna Building
29 West Susquehanna Avenue
Baltimore, Maryland 21204
(301) 583-2414
Attorney for Respondent

QUESTION PRESENTED FOR REVIEW

Whether the Court ought to grant certiorari in a case in which the conflict among the Circuits over the proper test to be applied in determining seaman status under the Jones Act would not affect the outcome of this litigation and would be the same under any of the tests, and which would entangle the Court in factual issues.

LIST OF AFFILIATED CORPORATIONS

The Respondent is affiliated with no other corporations, except wholly-owned subsidiaries.

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STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

Jones Act cases require minute inquiry into the particular facts of each case. In addition, the Circuit Courts have developed tests for Jones Act seaman status which are responsive to local conditions. Lastly, an examination of the facts of this case under the tests developed in the various Circuits, demonstrate that the outcome of this case would, in all likelihood, be the same under any of the tests of seaman status.

Therefore, the Court ought to decline to grant the Petition for long-standing policy considerations.

ARGUMENT

A. INTRODUCTION

The sole question presented by Petitioner as being of sufficient importance for the granting of a writ of certiorari by this Court in this case has to do with the proper test to be applied in assessing the nature of the job duties of a claimant in determining whether the applicable portion of the Jones Act test for seaman status has been met. It is by now universally recognized that there is, indeed, a conflict among the Courts of Appeal on this issue.

Therefore, Petitioners appear to invoke the Court's guideline contained in Supreme Court Rule 10.1(a) which states that the Court may exercise its discretion

to grant a writ:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter ....

The discussion which follows will set forth Respondent's reasons for arguing that the Petition ought not to be granted.

B. JONES ACT CASES HAVE ENTANGLED THE COURT IN FACTUAL ISSUES.

Justice White, in dissenting from denials of certiorari in Jones Act cases, has discerned that the Fifth Circuit has lead in adopting one approach, and that the Seventh and Third Circuits have adopted another. Lormand v. Aries Marine Corp., 484 U.S. 1031 (1988 - dissenting opinion joined in by Justice Blackmun);

International Oilfield Divers, Inc. v. Pickle, 479 U.S. 1059 (1987 - dissenting opinion joined in by The Chief Justice). In the case companion in all respects to this case, Stephenson v. McLean Contracting Co., Inc., 863 F.2d 340 (4th Cir. 1988), cert. denied 109 S.Ct. 2110 (1989), Justice White would have granted certiorari, although no reasons were given.

Clearly there is sentiment among certain of the Justices that, in a proper case, this Court should review the Jones Act tests for seaman status adopted by the courts of appeal, and formulate a test applicable in all cases, if that is possible.

One problem with Jones Act cases, however, is their intensely factual orientation.

> The many cases turning upon the question of whether an individual was a "seaman"

> demonstrate that the matter depends largely on the facts of the particular case ....

Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190 (1952).

One need only reflect upon the disagreements among the Justices in previous cases, as expressed in the majority and dissenting opinions, to note that the resolution of Jones Act cases involves careful scrutiny of the facts peculiar to each claim of seaman status. See, eg., Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959); Butler v. Whiteman, 356 U.S. 271 (1958); Grimes v. Raymond Concrete Pile Company, 356 U.S. 252 (1958). Even where the Justices are in agreement, cases such as South Chicago Coal and Dock Co. v. Bassett, 309 U.S. 251 (1940), demonstrate beyond argument

the entanglement of appellate courts, including this Court, in minute inquiry into the facts determining seaman status peculiar to a particular case.

This is to suggest, therefore, that such cases may bring this Court perilously close to a violation of its own policy of avoiding decisions which benefit only a particular litigant. Rice v. Sioux City Cemetery, 349 U.S. 70, 74 (1955). Stated differently, this Court may find itself in the business of reviewing Jones Act cases solely for the purpose of deciding whether the evidence or inferences drawn from it justified the action taken below, which is ordinarily not a reason for granting a writ of certiorari. See, General Talking Pictures Corporation v. Western Electric Co., 304 U.S. 175, 178 (1938); McAllister v. United States, 348 U.S. 19, 23-5

(1954 - dissent by Justice Frankfurter).

C. THE ISSUES NEED FURTHER DEVELOPMENT BY THE COURTS OF APPEAL.

In addition to the previous argument, there is another also based on the discretionary aspect of certiorari. It is doubtful that this Court can create a rule or test that will be equally satisfactory in each case, or which will be equally responsive to the differing circumstances prevailing among the Circuits. For example, it is common knowledge that the Fifth Circuit formulated its own expansive test of seaman status in order to provide a much-needed remedy to classes of offshore drilling platform workers who were, at the time, without recourse under any state or federal compensation scheme. See

concurring opinion of Judge Gee in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1076 (5th Cir. 1986).

However, in Circuits where such considerations do not pertain, a different test has evolved which is more in keeping with a particular Circuit's own view of the remedy which ought to be provided. See, eg., Johnson v. John F. Beasley Construction Company, 742 F.2d 1054, 1060-62 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985). In fact, when the circumstances peculiar to the Fifth Circuit were altered by the passage of remedial legislation, certain members of that court urged the reversal of previous authority and the adoption of the Seventh Circuit test. Barrett v. Chevron, U.S.A., Inc., supra, 781 F.2d at 1073, 1076; See, International Oilfield Divers, Inc. v. Pickle, supra.

The various Circuits have responded to local need in developing their respective tests and it may well be that as time progress and local conditions ameliorate, the courts of appeal will develop a test that all can agree upon. As stated by Justice Frankfurter in his opinion denying the granting of a writ in State of Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950):

> It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening.

D. THIS CASE DOES NOT PROPERLY FRAME THE ISSUES.

Justice White, as noted earlier, has observed two main lines of approach in stating the Jones Act test:

> The Fifth Circuit ... has taken the position that to be a seaman, a person need not assist in the transportation function of the vessel. ... Other

> courts of appeal, particularly the Third and Seventh Circuits, have rejected this view and require that before a plaintiff can sue under the Jones Act, he must be employed in such a way as to assist in the navigational function of a vessel.

International Oilfield Divers, Inc. v. Pickle, supra, (dissent - citations omitted).

This same distinction was also noted and discussed in the opinion of the Court below where it is made clear that the Fourth Circuit stands firmly with the Seventh and Third Circuits, and opposed to the Fifth Circuit, in its formulation of the Jones Act test of Seaman status, particularly in that portion of the test focussing on the job duties of the claimant. Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1485-6. (Petition, A-17, 18)

However, despite the clear differences among

the Circuits in the statement of the test, the facts of this case, as will be argued below, make it clear that there would have been no difference in result had the case been decided under the Fifth Circuit test, and the Circuits which follow it, or, as it was, under the Third and Seventh Circuit tests followed by the Fourth and other Circuits, and therefore, this case does not permit the issues to be adequately framed.

A brief summary of the tests in the Circuits to have considered the issue is helpful, and follows.

1. Circuits emphasizing aiding the general purpose of the vessel.

a. First Circuit:

The First Circuit has adopted the test formulated in Offshore Company v. Robison, 266 F.2d 769 (5th

Cir. 1959) without apparent alteration. See, Stafford v. Perini Corporation, 475 F.2d 507, 510 (1st Cir. 1973); accord, Bennett v. Perini Corporation, 510 F.2d 114 (1st Cir. 1975).

b. Fifth Circuit:

The test for Jones Act status in the Fifth Circuit as originally formulated in Offshore Company v. Robison, supra, has been recently reaffirmed in Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986), and later in Lormand v. Superior Oil Co., 845 F.2d 536, 539 (5th Cir. 1987), cert. denied 484 U.S. 1031 (1988), wherein the test is set out as:

> A worker claiming seaman status must establish (1) that he is assigned permanently to a vessel in navigation or performs a substantial part of his work on a vessel or fleet of vessels and (2) that his work contributes to the function of the vessel or to the accomplishment of its mission.

(citations and footnote omitted)

c. Eighth Circuit:

The Eighth Circuit has adopted the Offshore v. Robison test. Slatton v. Martin K. Eby Construction Co., Inc., 506 F.2d 505, 510 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975); accord, Miller v. Patton-Tully Transportation Co., Inc., 851 F.2d 202, 204 (8th Cir. 1988).

d. Eleventh Circuit:

In Hurst v. Pilings & Structures, Inc., 896 F.2d 504, 505 (11th Cir. 1990) the Eleventh Circuit has adopted a variant of the Fifth Circuit test set out in Guidry v. South Louisiana Contractors, Inc., 614 F.2d 447 (5th Cir. 1980).

2. Circuits with a "primarily in aid of navigation" or serving the "transportation function" of the vessel test.

a. Second Circuit:

The test in the Second Circuit is not as clear as in other Circuits, but it is placed under this heading due to the discussion in Klarman v. Santini, 503 F.2d 29, 33 (2nd Cir. 1974), concerning the "aid to navigation" test:

> ... requirements for a Jones Act seaman are that "the vessel must be in navigation, there must be a more or less permanent connection with the ship, and the worker must be aboard naturally and primarily as an aid to navigation". Harney v. William M. Moore Building Corporation, 359 F.2d 649, 654 (2nd Cir. 1966). While these requirements have not been interpreted strictly, they are not meaningless. ... Although "aid to navigation" has been read "very broadly", Harney, supra, 359 F.2d at 654, it is nevertheless required that an alleged seaman "perform services upon ships and [be] exposed to the unique hazards of work upon the sea". Mahramas v. American Export Isbrantsen Lines, Inc., 475 F.2d 165, 170 (2nd Cir. 1973).

See, also, McSweeney v. M.J. Rudolph Corp., 575 F.Supp. 746, 748 (E.D.N.Y. 1983).

b. Third Circuit:

The Third Circuit has a very strong "aid to navigation" test:

> This Court has previously held that among the "decisive elements necessary of proof in determining who is 'a member of a crew' within the meaning of the Jones Act" is a requirement "'that the worker be aboard [the ship] primarily to aid in navigation.'" Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 36 (3rd Cir. 1975), cert. denied, 423 U.S. 1054, 96 S.Ct. 785, 46 L.Ed.2d 643 (1976).

Simko v. C&C Marine Maintenance Co., 594 F.2d 960 (3rd Cir. 1979), cert. denied, 444 U.S. 833 (1979).

c. Fourth Circuit:

The Court below has stated the following as

being that portion of the test for the Fourth Circuit which focusses on the job duties of the claimant:

> The second prong of the test for determining seaman status under the Jones Act ... is whether a worker's duties, when considered in the aggregate, serve naturally and primarily as an aid to navigation. In making the "aid to navigation" determination, a consideration of whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel is appropriate.

Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1486 (Petition, A-18); accord, Stephenson v. McLean Contracting Co., Inc., 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S.Ct. 2110 (1989).

d. Sixth Circuit:

Although the Sixth Circuit has clearly included a navigational function requirement, it apparently has received an expansive reading. In Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982), the test is stated:

> ... in determining whether a particular employee is a "seaman" the following test shall be applied; 1) is the vessel in navigation, 2) does the employee have a more or less permanent connection with the vessel, and 3) was the employee on board the vessel primarily in aid of navigation?

Accord, Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732 (6th Cir. 1986). See also, Brown v. McKinnon Bridge Co., Inc., 732 F.Supp. 1479 (E.D.Tenn.1989).

Since, however, the Sixth Circuit cases cite and rely upon cases from the Fourth, Fifth and Seventh circuits, and the Searcy case, supra, 679 F.2d at 616, finds no real distinction between its test and the Fifth Circuit's test in Offshore Company v. Robison, supra, it is hard to tell exactly where the Sixth Circuit lies on the issue, but its inclusion under this heading is made because of the express "primarily in aid of navigation" language.

e. Seventh Circuit:

The Seventh Circuit test was developed in Johnson v. John F. Beasley Construction Co., 742 F.2d 1054, 1063 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985) as stating that there is evidence of seaman status where at the time of the injury:

> (1) the person injured had a more or less permanent connection with a vessel in navigation, and (2) the person injured made a significant contribution to the maintenance, operation, or welfare of the transportation function of the vessel.

f. Ninth Circuit:

The Ninth Circuit has adopted a test including a navigational duty standard:

> Under the Jones Act, status as a "seaman" depends on three factors: (1) the vessel on which the claimant was employed must be in navigation; (2) the claimant must have a more or less permanent connection with the vessel; and (3) the claimant must be aboard primarily in aid in navigation.

Gizoni v. Southwest Marine, Inc., 909 F.2d 385, 387 (9th Cir. 1990), citing Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392, 393 (9th Cir. 1973).

3. There is no conflict in result in this case.

As noted earlier, the facts are extremely important in each Jones Act case. The factual recitation in the opinion below is lengthy as to each Petitioner, 907 F.2d 1482-3, (Petition, A-3-7) and it is unnecessary to set forth these facts again. The Circuit Court's summary of its conclusions, however, is helpful:

> Next, appellants claim that their duties, when considered as a whole, establish that they served as an aid to navigation in the broadest sense. They do not contend that their duties primarily contributed to the transportation function of the vessel. It is clear that Yoash and Casson were pile drivers whose primary purpose was to aid in the building of a bridge, not in the navigation of the vessel. Their duties, when considered in the aggregate, were not to "serve naturally and primarily as an aid to navigation"

> .... Those activities which did relate to the transportation function of the CAPE FEAR were offshoots of the pile driving work.

907 F.2d 1486-7 (citations omitted, Petition A-20).

Clearly, the result reached below would have been the same in each of the Circuits with an aid to navigation or transportation function of the vessel. See, eg:

Second: McSweeney v. M.J. Rudolph Corp., supra, 575 F.Supp. at 748.

Third: Simko v. C&C Marine Maintenance Co., supra, 594 F.2d at 965

Sixth: Brown v. McKinnon Bridge Co., Inc., supra, 732 F.Supp. at 1484.

Seventh: Johnson v. John F. Beasley Construction Co., supra, 742 F.2d at 1064.

Ninth: cf., Gizoni v. Southwest Marine, Inc., supra, 909 F.2d at 387 (factual analysis).

Merely because the petitioners cannot meet the aid to navigation or transportation function test, and thus are not seaman under the tests in six Circuits, is not to assume that they thereby satisfy the status tests in the remaining four Circuits to have adopted a test. To so assume ignores the fact that the Fifth Circuit test, adopted verbatim in the First, Eighth and Eleventh Circuits, has other elements, among which is the necessity for the claimant to be assigned to a "vessel". Offshore Company v. Robison, supra, 266 F.2d at 779.

What constitutes a "vessel" for Jones Act purposes under the Robison test has been the subject of a number of decisions, the principals culled from which recently have been set out in Daniel v. Ergon, Inc., 892 F.2d 403, 407 (5th Cir. 1990), as follows:

> In numerous cases we have been called upon to determine the existence of a vessel. From these cases we have discerned three factors -

> common to floating platforms that are not considered vessels:
> (1) The structures involved were constructed and used primarily as work platforms;
> (2) they were moored or otherwise secured at the time of the accident; and
> (3) although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

Accord, Bernard v. Binning Construction Co., Inc., 741 F.2d 824 (5th Cir. 1984).

In applying this test, the Eleventh Circuit has held a barge identical in basic design and purpose to the crane barge in the present case, to be a work platform, and not a vessel for Jones Act purposes, as a matter of law. Hurst v. Pilings & Structures, supra, 896 F.2d at 506-7. Of significance to the Hurst decision was that the barge had no motive power of its own, and is towed by a tow boat when it needs to change location. The

barge was equipped with "spuds", which are legs which are lowered into the bed of the waterway to render it immobile. The barge was used as a work platform, with any transportation function being merely incidental to its primary purpose. The barge carried its own small boats and a crane to aid its function.

The barge involved in the present case appears to be identical. See Yoash v. McLean Contracting Co., Inc., supra, 907 F.2d at 1483 (Petition, A-5).

The Court in Hurst held that the claimant was not a Jones Act seaman because the floating platform to which he was assigned was not a "vessel" as a matter of law. See also, Daniel v.Ergon, Inc., supra; Bernard v. Binnings Construction Co., Inc., supra, Powers v. Bethlehem Steel Corp., 477 F.2d 643 (lst Cir. 1973), cert. denied, 414 U.S. 856 (1973).

Albeit under a different "prong" of the test, there is a very strong likelihood that the result reached by the Fourth Circuit in the present case would be the same under the test applied in the Fifth Circuit and the Circuits which have adopted its test.

4. A decision of this Court on the merits would not be Outcome Determinative.

Thus, the Court ought to exercise its discretion in denying the present Petition, since a review of the facts of this case shows that the outcome, in all likelihood, would have been no different had this case been decided under the test adopted by the Fifth Circuit and the courts of appeal following its lead. Therefore, this case does not present this Court with an opportunity to decide a matter of contest among the Circuits, but only, should the writ be granted, with a decision of an abstract issue,

albeit a fascinating and intellectually taxing one. This, of course, would run counter to the Court's own announced policy. See, eg, Rice v. Sioux City Cemetery, supra. The facts of this case simply do not create that tension between the various tests of seaman status which would highlight the differences and permit the proper common guiding principles to be perceived.

In Layne & Bowler Corporation v. Western Well Works, Inc., 361 U.S. 387 (1923), a patent infringement case, this Court had granted a petition for writ of certiorari in order to resolve an apparent conflict among the Circuits. Although the Court found in that case that the conflict was more apparent than real, and dismissed the writ accordingly, the language in Chief Justice Taft's opinion applies with some force in the present case, albeit the conflict here is real and not imagined, because there

would be no likely conflict in outcome in this case:

> ... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal.

261 U.S. at 393. See also Justice Frankfurter's dissent in McAllister v. United States, supra.

Because any decision of this Court is not likely to be outcome determinative, the existing conflict among the Circuits cannot be properly resolved.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari not be granted.

Thomas G. Young, III
YOUNG & BATTISTA, P.A.
Suite 707 Susquehanna Building
29 West Susquehanna Avenue
Baltimore, Maryland 21204
(301) 583-2414

Counsel for Respondent